

BOARD OF APPEALS CASE NO. 113

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BEFORE THE

APPLICANT: Joseph Deigert, Brian  
Baker and Michael Euler

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ZONING HEARING EXAMINER

REQUEST: Rezone 6 acres from AG to  
R3; 401 E. Jarrettsville Road and 2135  
Old Dixie Lane, Forest Hill

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OF HARFORD COUNTY

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Hearing Advertised

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Aegis: 3/1/00 & 3/8/00

HEARING DATE: April 26, 2000

Record: 3/3/00 & 3/10/00

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### **ZONING HEARING EXAMINER'S DECISION**

The Applicants, Joseph Deigert, Brian Baker and Michael Euler, are requesting that two parcels of approximately three (3) acres each, for a total of six (6) acres, be rezoned from AG Agricultural to R3 Urban Residential based upon an alleged mistake by the county in failing to reclassify the property during the 1997 Comprehensive Zoning Review process and based upon an alleged change in the neighborhood.

The subject properties are located at 401 E. Jarrettsville Road and 2135 Old Dixie Lane in Forest Hill, on the south side of East Jarrettsville Road between Belle Manor on the east side and Tuckahoe Farms on the west side. The parcels are more specifically identified as Parcels 257 and 54, in Grid 1F, on Tax Map 40. The parcels are located in the Third Election District and are currently zoned AG Agricultural. The parcels are located adjacent to each other and thus will be referred to hereinafter as "the subject property."

Mr. Stephen Nolan, licensed professional engineer and president of Campbell & Nolan Associates, Inc., appeared and testified as an expert in civil engineering and land development. Mr. Nolan indicated that he was involved in preparation of the site plan for the subject property. According to Mr. Nolan, the subject property was farm land at one time, but has since been surrounded by residential development. The property currently is comprised mostly of grass and trees, with two small residences and several sheds and outbuildings also located on the property. The property does have access to a public road, with 150 feet of frontage on Jarrettsville Road. Old Dixie Lane, which also services the property, is currently used as a driveway to the two residences.

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Mr. Nolan testified that there are no sensitive environmental features on the subject property, and that, if rezoned to R3, the plan would be to subdivide the property into twelve (12) single family lots which would be comparable to the lots in the Tuckahoe Farms subdivision which lies adjacent to the subject property. It was Mr. Nolan's testimony that the subject property is surrounded by residential subdivisions containing single family homes and townhouses. To the south is Belle Manor, a townhouse subdivision, zoned R3 and containing eight units per block. To the south and west of the property is another area zoned R3, but which is used as open space because it contains wetlands and a Natural Resource District which, in Mr. Nolan's opinion, could not be developed. To the northwest of the property are ten (10) single family lots which originally were designated as open space, but later purchased by Tuckahoe Farms and developed.

According to Mr. Nolan, the subject property is not suited for agricultural uses. The relatively small size of the property and its proximity to residential housing makes it far more suitable for residential development than for agricultural activities. In addition, Mr. Nolan indicated that he believes that the property is intended to be serviced by public water and sewer, services which are not normally available to land in the AG district. Mr. Nolan went on to state that he did not believe there would be any adverse environmental impacts to either the property or to the surrounding properties if the parcels were rezoned to R3.

One of the Applicants, Mr. Joseph Deigert, 2607 Laurel Brook Road, Fallston, was next to appear and testify. Mr. Deigert stated that he has been a land developer for the past 40 years and that over that time he has developed over 7500 lots, primarily in the Fallston, Forest Hill and Jarrettsville areas. He and his co-applicants, Mr. Baker and Mr. Euler, purchased the subject property in June of 1998 with the intention to develop the property with single family homes. According to Mr. Deigert, if the property is rezoned to R3, the Applicants would go through the subdivision approval process and then sell the lots to a builder for the actual home construction. He indicated that restrictive covenants would be placed on the development and each house plan would have to have his approval.

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Mr. Deigert further testified that, even though there was no request for rezoning filed during the 1997 Comprehensive Zoning Review process by the prior owner, he believes that because of the small size of the property, there is no viable agricultural use for the land. He also believes that no one who would desire to continue to farm the land would want to be surrounded by the type of residential development that currently encircles the subject property.

Mr. Lee Cunningham, president of Lee Cunningham & Associates, Inc., was qualified as an expert in land use and transportation planning. Mr. Cunningham indicated that he had reviewed the documents relating to the Applicants' petition and was familiar with the Applicants' request. According to Mr. Cunningham, the subject property is currently zoned AG while all the surrounding properties are zoned R3. The properties located across Jarrettsville Road are zoned RR Rural Residential. The county land use plan shows the area to be one of high intensity uses. It was Mr. Cunningham's testimony that, according to the zoning code, the purpose of agricultural-zoned land is to promote a rural character in the area and to provide for an environment which supports continued farming. An AG designation is not consistent with high intensity uses such as those contemplated in the R3 District. In addition, Mr. Cunningham stated that those uses permitted by special exception in an AG district would not be welcome on the subject property because of the surrounding residential neighborhoods and that those special exception uses would have more of a negative impact on the subject property than they would in an appropriately-zoned AG District.

Mr. Cunningham also offered testimony regarding the alleged mistake which occurred during the 1997 Comprehensive Zoning Review. Mr. Cunningham explained that the Issues Map which was produced during the 1997 Comprehensive showed part of the Tuckahoe Farms subdivision as having the designation of AG zoning. This designation, according to Mr. Cunningham, was incorrect. The Tuckahoe Farms subdivision, which later added the property which became known and developed as Blue Ridge Court, was rezoned to R3 prior to the 1997 Comprehensive, but this change did not apparently show up on the Issues Map.

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Accordingly, it is likely that the subject property was not considered for a change in zoning during the Comprehensive because the adjacent property, which became Blue Ridge Court, was not shown as having changed its zoning from AG to R3. According to Mr. Cunningham, the appropriate action to correct this mistake would be to rezone the subject property to R3. Such action would bring the subject property into conformance with the purpose of the master land use plan and the zoning code. In addition, Mr. Cunningham testified that there would be no negative impact as a result of rezoning this property to R3, either in terms of traffic conditions or in terms of any effect on lives or property. The requested rezoning would be consistent with good planning and zoning practices.

Mr. Anthony McClune, Manager, Division of Land Use Management for the Department of Planning and Zoning, testified regarding the Department's staff report and recommendation. According to Mr. McClune, the subject property was originally located in an area that was predominantly agricultural. During the 1982 Comprehensive Zoning Review, there were a significant number of zoning changes in the area: properties to the west were changed to CI and GI; some properties to the east were rezoned to residential, and properties to the north of East Jarrettsville Road were changed to RR. In 1982, the prior owners of the Tuckahoe property did request rezoning to LI, but the County Council voted to keep the land zoned AG. Then, in 1989, during the Comprehensive process, the property known as Belle Manor was rezoned to R3. In 1996, when the Tuckahoe property went up for sale, the contract purchasers filed a zoning reclassification request to rezone 66 acres from AG to R3 and GI. That rezoning was approved by the hearing examiner, so there was no need to consider rezoning of the Tuckahoe property from AG to R3 during the 1997 Comprehensive Zoning Review. Because the rezoning was approved shortly before the Comprehensive maps were prepared, and before the Tuckahoe rezoning appeal period had expired, the change in zoning on Tuckahoe was not included on the Issue Maps prepared for the County Council as part of the 1997 Comprehensive. Therefore, the Council did not know that the Tuckahoe property, adjacent to the subject property, had been rezoned to R3 at the time that it voted on the Comprehensive Zoning Review legislation.

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According to Mr. McClune, if the zoning change had been noted on the maps, the Department of Planning and Zoning would have raised the issue of the rezoning of the subject property in order to make it consistent with the master land use plan and the high intensity designation in the area. Because of the mistake on the maps, the issue was never raised. It was Mr. McClune's testimony that there are simply no facts which would have caused the Department to recommend that the subject property retain its AG zoning and it was his opinion that, had the Department recommended rezoning of the subject property to R3 during the Comprehensive Zoning Review, the County Council would have approved the rezoning at that time. Accordingly, it is the Department's recommendation that the requested rezoning from AG Agricultural to R3 Urban Residential be approved based upon the mistake which occurred in the preparation of the Issues Maps during the 1997 Comprehensive Zoning Review process.

Several witness appeared and testified in opposition to the request. Ms. Rachel Wright, 2210 Historic Drive, Forest Hill, testified that her backyard backs directly to the subject property and that at the time that she purchased her lot, she was informed that there would be no new development behind her. She was concerned about a proposed road that would be put in behind her house to service the proposed development and she expressed concerns about safety and traffic due to the increase in the number of homes in the area, where traffic is apparently already a problem at certain times.

Mr. Edward Fruhling, 2305 Howland Drive, Forest Hill, testified that the view from his property will be adversely affected by the proposed development. The elevation of his property in relation to that of the subject property is such that lights from cars in the proposed subdivision will shine directly into his bedroom. He is concerned about the design of the properties in the proposed subdivision and how it will impact his enjoyment of his home.

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Ms. Deborah Hoffman, 2174 Historic Drive, Forest Hill, testified that she lives in the Belle Manor subdivision and her lot backs up to the subject property. Ms. Hoffman indicated that it is her belief that East Jarrettsville Road is not designed to accommodate the additional traffic which will be generated from the proposed subdivision. The area is already very congested, according to Ms. Hoffman, and she believes that additional housing on the subject property would be detrimental to hers and other adjoining properties by creating more noise, annoying car lights and street lights, and that the property value of the existing homes would be reduced because of the lack of open space. Ms. Hoffman indicated that it would be appropriate for the subject property to remain a farmette.

Mr. Tom Fidler, 2182 Historic Drive, Forest Hill, testified in opposition to the request. It was Mr. Fidler's testimony that the subject property serves as a natural and necessary buffer between the two highly developed subdivisions of Tuckahoe and Belle Manor. He was concerned about potential runoff problems and hoped that, if the rezoning were granted, there would be an effort to keep as many trees as possible.

### **CONCLUSION:**

The Applicants are requesting a rezoning of the subject property from AG to R3 based upon a mistake in failing to rezone the property during the 1997 Comprehensive Zoning Review and based upon an alleged change in the character of the neighborhood since the 1997 Comprehensive as well. While there was insufficient evidence presented to support the argument that the character of the neighborhood has changed, the majority of the evidence presented does support the Applicants' claim that there was a mistake made during the comprehensive rezoning process which would justify the granting of the Applicants' request.

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The principles of law regarding rezoning based upon an alleged mistake or a change in the neighborhood are outlined in the case of Boyce v Sembly, 25 Md. App. 43, 334 A.2d 137 (1975). These principles may be summarized as follows:

1. The zoning classification assigned a subject property as part of the last comprehensive rezoning is presumed to be correct.
2. A piecemeal zoning reclassification of a parcel of land cannot be granted unless and until the presumption of correctness is overcome.
3. The presumption of correctness can only be overcome by strong evidence that there was a mistake in the comprehensive zoning.
4. There has been a change in the character of the neighborhood since the last comprehensive zoning which justifies the piecemeal zoning reclassification.
5. The burden to show mistake or error in zoning is to show both:
  - a) The then existing facts and conditions that allegedly made the comprehensive zoning incorrect; and also,
  - b) The literal failure of the Council to have considered those facts and conditions.
6. Once a change in the character of the neighborhood or a mistake in the last comprehensive zoning is established, rezoning is permissible but not mandated.
7. However, once an Applicant establishes the requisite change in the character of the neighborhood or a mistake in the comprehensive zoning, the denial of the requested reclassification must be sufficiently related to the public health, safety or welfare to be upheld as a valid exercise of the police power. Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972).

See also, People's Counsel for Baltimore County v Beachwood I Limited Partnership, 107 Md. App. 627, 670 A.2d 484 (1995); and White v Spring, 109 Md. App. 692, 675 A.2d 1023 (1996).

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As the Court stated in Boyce:

"A perusal of cases, particularly those in which a finding of error was upheld, indicates that the presumption of validity accorded to a comprehensive zoning is overcome and error or mistake is established where there is probative evidence to show that the assumptions or premises relied upon the Council at the time of the comprehensive rezoning were invalid. Error can be established by showing that at the time of the comprehensive zoning the Council failed to take into account then existing facts, or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension. Bonnie View Club v. Glass, 212 Md. 16, 52-53, 217 A. 2d 647, 651 (1966); Jobar Corp. v. Rodgers Forge Community Ass'n., 236 Md. 106, 112, 116-18, 121-22, 202 A. 2d 612, 615, 617-18, 620-21 (1964); Overton v. County Commissioners, 255 Md. 212, 216-17, 170 A. 2d 172, 174-76 (1961); see Rohde v. County Board of Appeals, 234 Md. 259, 267-68, 199 A. 2d 216, 218-19 (1964). Error or mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect."

25 Md. App. At 50-51, 334 A.2d at 142-43.

In the case at hand, the testimony presented at hearing demonstrates that the County Council was given erroneous information during the 1997 Comprehensive Zoning Review process and was under a misapprehension that the property adjacent to the subject property was zoned AG, when in fact it had been rezoned to R3, in conformity with other properties in the area. In addition, it appears that an error occurred in the Department of Planning and Zoning, the department which raises issues relating to the zoning of properties to the Council during the comprehensive review process. It appears that the Department overlooked the adjacent rezoning, which caused an error on the Issues Map and led to a failure to include the subject property in the comprehensive process at all. These facts, taken together with the evidence demonstrating that the property is currently not well suited for any viable agricultural use, is not compatible with surrounding properties, and appears to be incompatible with the master land use plan which designated the property as "high intensity", support the Applicants' request that the property be rezoned to the R3 classification.



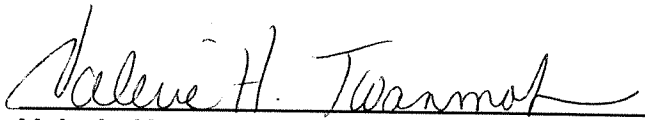
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Accordingly, it is the finding of the Hearing Examiner that the Applicants have met their burden of proof to justify the requested rezoning based upon the principle of mistake. The overwhelming majority of the evidence demonstrates that a mistake occurred in failing to rezone the property to R3 during the 1997 Comprehensive Zoning Review, and thus the presumption of correctness of that classification is overcome. There was insufficient evidence to show that a denial of the rezoning would promote the public health, safety or welfare. While opponents of the request raised reasonable concerns regarding the impact of the proposed subdivision on neighboring residents, those concerns are more appropriately addressed during the site plan and subdivision approval process. The requisite legal tests regarding rezoning at this stage appear to have been met.

Therefore, it is the recommendation of the Hearing Examiner that the Applicants' request to rezone approximately six (6) acres from the AG Agricultural to the R3 Urban Residential classification be approved due to a mistake in the 1997 Comprehensive Zoning Review.

Date

June 12, 2000



Valerie H. Twanmoh  
Zoning Hearing Examiner